BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LYNN MARIE LANGEL Claimant	)	
VS.	)	
BRIGHTON GARDENS Respondent	)	Docket No. 1,016,720
AND	)	
INS. CO. OF THE STATE OF PA. Insurance Carrier	)	

ORDER

Claimant requested review of the November 3, 2006 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on February 6, 2007.

APPEARANCES

Michael Wallace of Lenexa, Kansas, appeared for the claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The parties agreed claimant suffered a compensable back injury. The Administrative Law Judge (ALJ) determined that claimant did not make a good faith effort to retain her job with respondent as she was terminated for excessive absences unrelated to her injury. The ALJ imputed the post-injury wage claimant earned working for respondent which was the same as her pre-injury wage. Accordingly, the ALJ determined claimant was not entitled to a work disability and was limited to a permanent partial disability award based upon her functional impairment. However, the ALJ further determined claimant had not suffered any permanent functional impairment as a result of

her work-related injury.[1] Consequently, claimant's award was limited to her temporary total disability compensation as well as medical compensation for her back injury but she was not awarded any permanent partial disability compensation.

Claimant requests review of the nature and extent of disability. Claimant argues that her absences from work after her injury were either related to the injury or an unrelated illness. Consequently, claimant argues she is entitled to a 32.5 percent work disability based upon a 33 percent wage loss and a 32 percent task loss.

Respondent argues claimant has failed to meet her burden of proof that she has any increase in functional impairment and failed to establish she made a good faith effort to retain appropriate employment. Respondent requests the Board to affirm the ALJ's Award.

The sole issue for Board determination is the nature and extent of claimant's disability, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, and having considered the parties' briefs and oral arguments, in addition to the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a certified nurse's aide for respondent. On March 20, 2004, she was helping a 200-pound resident transfer from the bed to a wheelchair when her lower back popped. Claimant advised the charge nurse about the incident and sought medical treatment the next day. From April 7, 2004, through September of 2004, claimant was off work and received temporary total disability compensation.

Claimant returned to work on September 3, 2004, but called in on September 7, 2004, stating her back was hurting. She was sent to see Dr. Joseph F. Galate and returned to work on September 9, 2004. Claimant worked part of the day and again made complaints of back pain. Claimant was then given two weeks off which were not charged as absences. Claimant returned to work on September 27, 2004, and continued to work until October 18, 2004, when she called in stating her back hurt too much for her to work. Claimant was told to see a doctor and provide a copy of the doctor's status report. Claimant finally provided respondent a copy of her work status report on October 26, 2004, which indicated claimant was able to work. Claimant was then given a written warning regarding her absences from work.

On November 8 and 9, 2004, claimant called in and indicated she was ill. When she returned to work on November 10, 2004, she later indicated that her stomach hurt and she

[1] See K.S.A. 44-501(c).

needed to leave work. When claimant returned to work on November 15, 2004, she had a doctor's slip. But respondent gave her a final written warning.

On December 8, 2004, claimant called in stating she had a fever and was unable to work. Larie A. Gundelfinger, respondent's director of nursing, called claimant and told her she needed to see a doctor and to bring the report to respondent. The director of nursing testified regarding her conversation with claimant as follows:

> Q. Okay. What kind of discussions did you have with her about the illness that she was claiming or the documentation that she needed to provide?
>
> A. Well, I spoke to her and said she needed to see the doctor. She stated that she had no insurance and that the free clinic would not see her for a migraine. And I reminded her that she had called in because she was ill with a fever, not a migraine. And she stated that had come on later on. I asked her to have the clinic provide a statement indicating that they would not see her for a migraine. She said that the clinics were closed that day. I suggested maybe they were only closed for lunch and try again. I suggested the one at Oak Park Mall. She called me back and stated that they would not see her for her migraine at this point because it was over. I asked her if she still had a fever or headache, and she stated no.
>
> Q. Did she end up coming back to work that day on the 9th?
>
> A. No. I terminated her related to excessive absences.[2]

On cross-examination Ms. Gundelfinger stated that absences related to claimant's back injury were not counted against her but agreed that on the final written warning claimant was given she had disagreed and noted her absence was due to back pain from her work injury.[3] Moreover, when she was absent several days due to illness her doctor had written that claimant had a contagious infection which prevented her from working. Finally, it was admitted that on the last occasion even if claimant had gotten a doctor's slip she would still have been terminated.

Although Dr. Galate had initially treated claimant, the respondent later referred claimant to Dr. Steven L. Hendler for evaluation and treatment. Dr. Hendler first examined claimant on October 4, 2004. Claimant gave a history that when lifting a patient on March 6, 2004, she felt a pop in her back with an immediate onset of pain. Claimant had received treatment with Dr. Galate which included x-rays and MRI of the lumbar spine and medications as well as a regime of physical therapy which had increased her pain symptoms. Dr. Hendler diagnosed claimant with degenerative disk disease and a lumbar

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[2] Gundelfinger Depo. at 30-31.

[3] *Id.*, Ex. G.

strain. He recommended physical therapy. The doctor saw claimant on four additional occasions and by the last visit on November 29, 2004, he concluded claimant was at maximum medical improvement.

On September 9, 2005, Dr. Hendler again examined claimant at the request of respondent's attorney. The doctor concluded claimant's condition was unchanged from the November 29, 2004 office visit. Dr. Hendler concluded claimant did not have any permanent impairment as a result of the March 6, 2004 injury. Upon review of the task list prepared by Ms. Titterington, Dr. Hendler opined that since he did not impose any restrictions, consequently, there would be no task loss.

But when asked about claimant's previous back injuries and the lack of restrictions the doctor noted there was a patient-job mismatch. He explained:

> Q. When you say you don't think it's a good match, that's because you believe it would potentially cause injury?
>
> A. I'm saying that if she's doing that kind of activity and she's having repeated problems doing that activity, she needs to be thinking about why - - there's an old joke that insanity is doing the same thing over and over and expecting a different outcome, but if she's having persistent injuries doing certain kind of work, it's not a question in my mind that she needs restrictions based on her work. The question in my mind is why is she continuing to do that kind of work activity if she knows that she somehow manages to end up straining herself every time she does it.
>
> Q. So she shouldn't be doing that kind of stuff anymore?
>
> A. I didn't say that. I simply said it would be the kind of thing that if it were me, I would think about why am I doing this over and over and over if when I do it I have a propensity to have injuries.[4]

Dr. James A. Stuckmeyer saw claimant on April 7, 2005, at the request of claimant's attorney. Dr. Stuckmeyer was aware claimant had a history of multiple lumbosacral spine injuries but concluded that as a result of her work-related injury on March 20, 2004 she developed new symptoms of radiating pain in her lower extremities. Using the AMA *Guides*[5], the doctor opined claimant had a 25 percent functional impairment. He further opined that claimant had a preexisting 12.75 percent functional impairment to the spine and an additional 11.25 percent functional impairment as a result of the March 20, 2004 accidental injury. As noted by the ALJ, Dr. Stuckmeyer testified that although DRE

[4] Hendler Depo. at 31.

[5] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Category III assigns a 10 percent impairment, the doctor believed that because DRE Category IV assigns a 20 percent impairment there is a range from 10 to 19.99 percent for a DRE Category III in which a physician may place the rating. Consequently, the doctor assigned claimant to the high end and added an additional 5 percent for pain.

Dr. Stuckmeyer imposed permanent restrictions that claimant limit repetitive bending and lifting with no lifting greater than 35 to 50 pounds on a very occasional basis. Dr. Stuckmeyer reviewed the list of claimant's former work tasks prepared by Ms. Titterington and concluded claimant could no longer perform 8 of the 22 tasks for a 36 percent task loss. But when told claimant revised the weight she had lifted performing task number 15 he changed his opinion to indicate that she would be able to perform that task. Consequently, he ultimately concluded claimant could no longer perform 7 of the 22 tasks for a 32 percent task loss.

Mary Titterington, a vocational rehabilitation consultant and counselor, conducted a personal interview with claimant on January 12, 2006, at the request of claimant's attorney. Because of claimant's difficulty understanding basic concepts as well as the fact that she was a special education student throughout high school, Ms. Titterington gave claimant a Wide Range Intelligence Test. Ms. Titterington determined claimant is very low functioning mentally deficient. Ms. Titterington noted that it would be consistent for claimant to have difficulty remembering things. Ms. Titterington testified:

> Q. So she would score in the bottom one-tenth of 1 percent of the general population with regard to intelligence.
>
> A. Absolutely.
>
> Q. The reason I'm asking these questions is about a week ago she testified in this case and she had difficulty in remembering many things.
>
> A. Right.
>
> Q. Someone might get the idea that she was trying to mislead by saying she didn't remember. Based upon the testing you've done, do you believe there was a conscious effort to mislead or is it something else?
>
> A. No. I mean, this woman is just very low functioning and it's very consistent. In the Shawnee Mission school system, you're not placed in the learning center or in the special education program without a substantial amount of testing and documentation that you're low functioning.
>
> She has been low functioning all of her life, and one of the things when you have a low intelligence is generally you don't have very good memory skills and things are difficult to - - abstract reasonings, questioning, they're just difficult to understand

> and comprehend and be consistent a lot of times in answers. I mean, that's something I see frequently with low functioning people.[6]

Ms. Titterington further opined that claimant's physical capabilities are essential to her employability as her tested intelligence places her in the mentally deficient range of functioning.

Ms. Titterington prepared a task list of 22 nonduplicative tasks claimant performed in the 15-year period before her injury. She further opined claimant had the ability to earn from $6.50 to $8.50 an hour or between $260 and $340 a week.

Michael Dreiling, a vocational and rehabilitation consultant, conducted a personal interview with claimant on May 17, 2006, at the request of respondent's attorney. Mr. Dreiling opined that after her termination from respondent, claimant did make a good faith effort at finding appropriate employment. Mr. Dreiling further opined claimant's current earning ability is $8.45 an hour or $338 a week.

Although claimant had settled four workers compensation claims between 1997 and 2002 she could recall little about those claims. She did agree that all four were for back injuries, one was the result of transferring a resident, another she was lifting a patient and felt a pop in her back, the third was also from transferring a patient and strained her low back and the fourth she hurt her back placing a patient on a bed pan.

> Q. Now, you've had problems with your back before you were hurt at Brighton Gardens; is that right?
>
> A. Yes.
>
> Q. I think you've had some prior workers' compensation claims that have all been settled; is that right?
>
> A. Yes.
>
> Q. I think the last workers' compensation case that you had was for an injury in 2002. Do you recall that one?
>
> A. No.
>
> Q. Well, your lawyer at the time sent you to see a Dr. Koprivica. Do you remember seeing him?
>
> A. I don't recall that.

[6] Titterington Depo. at 9-10.

> Q. Well, he evaluated you and gave you a rating, but he didn't place any restrictions on you. Before you got hurt at Brighton Gardens had any doctor restricted your activities because of your back?
>
> A. No.
>
> . . .
>
> Q. Before you got hurt at Brighton Gardens on March the 20th, 2004, even though you had these prior back troubles how was your back doing?
>
> A. Doing good.
>
> Q. Were you taking any medication for it?
>
> A. No.
>
> Q. Had you had any treatment for your back in, let's say the 12 months before you got hurt?
>
> A. No.
>
> Q. Do you still have any problems with your back?
>
> A. Yes.[7]

After she was terminated from her employment with respondent claimant found a job with Merry Maids doing house cleaning. She then worked part-time for Price Chopper demonstrating products and on May 4, 2006, she started working for Molly Maids as a housekeeper. The parties stipulated that claimant's post-injury average weekly wage at Molly Maids was $315 per week.

Because claimant has sustained an injury that is not listed in the "scheduled injury" statute, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a). That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall

[7] R.H. Trans. at 16-17.

> not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[8] and *Copeland*.[9] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual post-injury wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. [10]

The Kansas Court of Appeals in *Watson*[11] noted that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence.

Initially, a determination is made whether claimant has made a good faith effort to find or retain appropriate post-injury employment. If so, claimant's actual wage is compared with claimant's pre-injury wage to determine the percentage of wage loss. On the other hand if it is determined claimant did not engage in a good faith effort to retain or find appropriate employment then *Copeland* requires a factual determination of an appropriate post-injury wage to impute based upon all the evidence including expert testimony concerning the claimant's capacity to earn wages. The fact that a job search has ended or was not engaged in good faith does not automatically limit claimant to the functional impairment. It is only when a review of all the evidence results in a

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[8] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[9] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[10] *Id.* at 320.

[11] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

determination that the appropriate post-injury wage to impute is at least 90 percent or more of the pre-injury wage that claimant is limited to the functional impairment.[12]

After returning to work following an injury, a worker must also make a good faith effort to retain that employment or a wage will be imputed for purposes of the wage loss prong of the permanent partial general disability formula. Accordingly, respondent argues claimant was terminated for violating company policy and, therefore, claimant is precluded from receiving an award for a work disability (a permanent partial general disability greater than the whole body functional impairment rating).

Respondent desires the Board to limit its inquiry into whether or not respondent terminated claimant for violating company policy. The Board, however, believes the test is broader. The appropriate test is whether claimant made a good faith effort to retain her employment with respondent and, therefore, company policy is only one factor to be considered in that analysis. And whether an injured worker has made a good faith effort to retain post-injury employment is decided on a case-by-case basis as it is a question of fact to be determined after carefully examining all the facts and circumstances.

In short, injured workers who are terminated for reasons other than their injuries are not necessarily precluded from receiving an award of permanent disability benefits for a work disability.[13]

Respondent has an absentee policy in which employees are subject to termination when they accumulate 8 absences in a 12-month period. Larie A. Gundelfinger, respondent's director of nursing, described the respondent's absentee policy. It does not matter if the absences are excused or unexcused. The policy provides that at any time during a rolling 12-month period if an employee accrues 5 absences the employee receives coaching and counseling. At 6 absences the employee receives a warning. At 7 absences the employee receives a written warning. At 8 absences a recommendation for termination is made.

Claimant accumulated at least the 8 absences in a 12-month period but a number of the absences occurred before her work-related injury. And the final three absences were for an inability to work which claimant alleged was due to back pain from her work-related injury, a contagious infection for which her doctor restricted her from work and finally another personal illness described as a fever and migraine headache. It simply cannot be said that the fact claimant contracted illnesses demonstrates a lack of good faith

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[12] *Rash v. Heartland Cement Co.*, ___ Kan. App. 2d ___, 154 P.3d 15 (2006).

[13] *Beck v. MCI Business Services, Inc.*, 32 Kan. App. 2d 201, 83 P.3d 800, *rev. denied* 276 Kan. 967 (2003); *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

on her part. And her back pain certainly appeared to be related to her injury even though the doctor cleared her for work.

The Board finds claimant's absences from work were reasonable. At first, the claimant's testimony and inability to recall events appear evasive but when viewed in the context of her mental deficiency it becomes consistent and more understandable. As noted by Ms. Titterington, the claimant's forgetfulness is entirely consistent with her mental deficiency. The record does not indicate claimant has refused to work or that she has attempted to manipulate her workers compensation claim. Considering all the facts and circumstances, the Board finds claimant made a good faith effort to retain her employment with respondent. Consequently, the wages that claimant was earning while working for respondent after her injury but before her termination should not be imputed for purposes of the wage loss component of the permanent partial general disability formula.

The next question is whether claimant has proven she has made a good faith effort to find appropriate employment following her December 2004 termination. The claimant obtained employment as a housekeeper, part-time work demonstrating products at a supermarket and, again as a housekeeper for Molly Maids. Mr. Dreiling testified that claimant did make a good faith effort to find appropriate employment. Ms. Titterington expressed amazement at how many jobs claimant has found. She testified:

> Q. Ms. Titterington, I just became involved in this case about a week ago. That was the first time I met Ms. Langel. When I did, she was actually quite proud of the fact that she has basically maintained employment during her entire adult life. Was that your perception?
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> A. Oh, absolutely. I, frankly, am amazed that she has found as many jobs as she has and that she has maintained employment. I think part of that has to do with her good social skills that she learned from a very supportive family, but if you also look at her work history, you notice she has had 22 jobs, I think is what I counted, in a really short period, like 10 to 12 years.
>
> I think what happens is that she comes across to employers and gets jobs but can't keep them when they find out how low functioning she is. That's the problem.[14]

The claimant has met her burden of proof to establish that she made a good faith effort to find appropriate employment after she was terminated from her job with respondent. Consequently, her actual wage loss will be utilized in the wage loss component of the permanent partial general disability formula. The parties stipulated that claimant's pre-injury average weekly wage was $468 and her post-injury average weekly wage is $315. This results in a 33 percent wage loss.

[14] Titterington Depo. at 22.

Turning to the task loss component of the permanent partial general disability formula the record contains the opinions of Drs. Hendler and Stuckmeyer. Dr. Hendler concluded claimant would have no task loss because she had no permanent restrictions as a result of her work-related injury. Conversely, Dr. Stuckmeyer provided claimant with permanent restrictions as a result of her work-related injury and based upon Ms. Titterington's task list concluded claimant could no longer perform 7 of the 22 tasks for a 32 percent task loss.

The claimant testified that she had never been provided permanent restrictions after her previous injuries and her back was asymptomatic until the March 20, 2004 injury. Dr. Stuckmeyer concluded claimant's condition had permanently worsened as she now, for the first time, had complaints of radiculopathy. The contemporaneous medical records confirm claimant complained of radiating pain into her lower extremities as she received treatment from both Drs. Galate and Hendler.

In this case the Board finds Dr. Stuckmeyer's opinion that claimant required permanent restrictions more persuasive than Dr. Hendler's refusal to impose any restrictions. It simply seems disingenuous for Dr. Hendler to agree that claimant is mismatched for the jobs she performs but to conclude that she didn't need restrictions. He insists she should recognize that she keeps getting injured and should find other employment. As restrictions are generally imposed to prevent further injury, it is troublesome for the doctor to agree that claimant is mismatched for the jobs she performs but conclude that even though she suffers re-injury she does not need restrictions.

The Board finds claimant has met her burden of proof to establish that she suffers a 32 percent task loss as a result of her work-related injury on March 20, 2004. Averaging the 32 percent task loss with the 33 percent wage loss as required by K.S.A. 44-510e(a), the Board finds claimant is entitled to a 32.5 percent work disability award.

Finally, mention should be made that Dr. Stuckmeyer opined that claimant had a 12.75 percent preexisting impairment. In arriving at that opinion the doctor apparently just added the disability percentages claimant had received for her previous workers compensation claims.[15]

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased

[15] Stuckmeyer Depo., Ex. 2.

> disability. Any award of compensation shall be reduced by the amount of **functional** impairment determined to be preexisting.[16] (Emphasis Added)

And functional impairment is defined by K.S.A. 44-510e(a), as follows:

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) requires that functional impairment be determined based upon AMA *Guides*. The Board has held that any preexisting functional impairment must also be determined utilizing the same criteria and this approach has been upheld by the Court of Appeals.[17]

Furthermore, the Kansas Court of Appeals has recognized that previous settlement agreements and previous functional impairment ratings are not necessarily determinative of a worker's functional impairment for purposes of the K.S.A. 44-501(c) reduction. In *Mattucci*[18], the Kansas Court of Appeals stated:

> Hobby Lobby erroneously relies on *Baxter v. L.T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987), and *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d 39, 611 P.2d 173 (1980), to support its position. In attempting to distinguish the facts of the present case, Hobby Lobby ignores that both Baxter and Hampton instruct that a previous disability rating should not affect the right to a subsequent award for permanent disability. *Baxter v. L.T. Walls Const. Co.*, 241 Kan. at 593; *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d at 41. Furthermore, the *Hampton* court declared that "settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. **The rating for a prior disability does not establish the degree of disability at the time of the second injury**." 241 Kan. at 593. (Emphasis added)

It should be recognized that the determination of a functional impairment percentage by a physician is not an exact science. Nor is the number assigned an absolute. An impairment percentage represents an informed estimate and different physicians

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[16] K.S.A. 44-501(c).

[17] *Leroy v. Ash Grove Cement Company*, No. 88,748 (Kansas Court of Appeals unpublished opinion filed April 4, 2003).

[18] *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion filed June 9, 2000).

evaluating the same person, using the same standard, can arrive at widely divergent percentages of functional impairment ratings. An injured worker's condition can improve or worsen with the passage of time. Again, that is why the determination of the preexisting functional impairment percentage at times requires review of numerous factors and the evidence that a claimant has previously received a functional impairment rating is, at times, not absolutely controlling. Moreover, a functional impairment percentage agreed upon as part of a lump-sum compromise settlement may take into consideration many factors unrelated to the functional impairment percentage, such as the rights to future medical treatment or review and modification.

A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. However, the physician must use the claimant's contemporaneous medical records regarding the prior condition. Additional factors to consider include the level of claimant's pain immediately before the recent injury, whether claimant received additional treatment and the nature of his activities in the intervening years in order to determine the preexisting impairment.[19] Those factors must then be the basis of the impairment rating using the appropriate edition of the AMA *Guides*.

Simply stated, based upon this record it cannot be stated that Dr. Stuckmeyer appropriately arrived at his opinion regarding claimant's preexisting impairment when he simply added up percentages of disability claimant had allegedly received for previous workers compensation claims. Again, the fact that claimant settled previous claims for certain percentages does not, standing alone, establish her preexisting functional impairment. While it is probably true claimant had a functional impairment as a result of her previous injuries, for purposes of K.S.A. 44-501(c) respondent and its insurance carrier have failed to prove the percent of functional impairment per the AMA *Guides* that existed in claimant's back before her March 20, 2004 accident.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated November 3, 2006, is modified to award claimant a 32.5 percent permanent partial disability.

The claimant is entitled to 20 weeks of temporary total disability compensation at the rate of $312.02 per week or $6,240.40 followed by 133.25 weeks of permanent partial disability compensation at the rate of $312.02 per week or $41,576.67 for a 32.5 percent work disability, making a total award of $47,817.07, which is ordered paid in one lump sum less amounts previously paid.

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[19] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, Syl. ¶ 5, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

IT IS SO ORDERED.

Dated this _____ day of April 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael Wallace, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge